

**Before the  
Federal Communications Commission  
Washington, D.C.**

In the Matter of	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	)	
	)	

**Comments of the  
United States Department of Transportation**

Introduction

The United States Department of Transportation (“DOT” or “Department”) has become aware of the above-referenced regulatory proceeding at the Federal Communications Commission (“FCC” or “Commission”) that concerns, in part, the subject of another regulatory proceeding now ongoing at DOT. The Department would like to advise the FCC of this overlap and to request that the Commission continue to allow automated communications (e.g., voice and text) from airlines to their passengers regarding changes in flight status without prior written consent, for the reasons discussed below.

Background

The Telephone Consumer Protection Act (“TCPA”), which restricts the transmission of various kinds of unsolicited commercial communications to consumers (“telemarketing calls”), is administered by the FCC and the Federal Trade Commission (“FTC”) within their respective areas of jurisdiction. See *Rules and Regulations Implementing the TCPA of 1991, Notice of Proposed Rulemaking*, CG Docket No. 02-278, FCC 10-18, adopted January 20, 2010, and released January 22, 2010 (“FCC NPRM”); also 75 Fed. Reg. 13471 (March 22, 2010). These agencies’ regulatory provisions are not always identical, and when their authority overlaps, the more stringent rules (usually those of the FTC) apply. *Id.* The FCC in this proceeding generally seeks comment about whether and to what extent its rules should harmonize with those of the FTC.

Airlines are subject to the rules of the FCC with respect to their use of telemarketing calls. Currently, FCC regulations prohibit such calls to residential telephone subscribers without prior consent unless there is an “established business relationship” between the subscriber and the source of the telemarketing call. FCC NPRM at 6; 75 Fed. Reg. at 13475. This exemption has been interpreted by the FCC to apply to informational calls by airlines to passengers notifying them of changes in flight status. *See* FCC NPRM at 11, note 63.

However, the FTC’s telemarketing rules require prior written consent in *all* cases involving prerecorded calls, regardless of any business relationship. 16 C.F.R. § 310.4(b)(v)(A); 75 Fed. Reg. at 13475. The Commission has now sought comment on whether it should also follow this approach. If adopted, this would prohibit airlines from leaving prerecorded messages of flight delays and cancellations for any passenger from whom the airlines does not have written consent.

#### DOT’s Position

The Department’s oversight of the transportation industry extends to the protection of airline passengers. Recently DOT published a notice of proposed rulemaking (“DOT NPRM”) that addresses, among other things, the communication of flight status changes to passengers. 75 Fed. Reg. 32318 (June 8, 2010). In the DOT NPRM, the Department noted that passengers need flight status updates as soon as they become available in order to make decisions about alternate travel plans. We explained that failures by carriers to provide timely and accurate flight status information not only inconveniences passengers and other members of the public, but can also result in additional expense to those persons. *Id.* at 32331.

DOT accordingly proposed to require that airlines promptly notify passengers of changes to the status of their flights. Airlines would do so through various means. At airports, airlines would make announcements in the boarding gate areas and through flight information displays within their control. Airlines would also have to promptly update all flight status details available on their Web sites and through their telephone reservation systems. *Id.* at 32330. Of particular relevance here is the proposal requiring large airlines that already notify passengers of changes to the status of their flights via various widely-used media, including computer-generated telephone/voicemail, text messages, and e-mails, to continue to do so. *Id.* at 32330-31.

Many airlines have for years followed a practice of contacting ticketed passengers to advise them of changes in the status of their flights in the event of cancellation or delay. These communications are usually automated not simply because that is cost-effective, but also because the information conveyed is not personal to each individual; the new flight status affects all passengers on the flight and therefore the information is the same with respect to each incident. Whether by wireline or wireless telephone, text messages, or other means, these notices protect consumers by providing advance notice of schedule changes and by enabling them to take appropriate steps with respect to their own travel plans. We are concerned that a Commission requirement that airlines obtain written consent prior to providing these notifications will result in fewer passengers obtaining this beneficial information, because airlines might well not have written consent from every passenger.

These notifications warrant their current exemption from the Commission's prior consent requirements because they are entirely unlike other automated communications with which the agency is concerned. The FTC based its decision to require prior written consent of the industries within its jurisdiction because the rulemaking record in that case reflected consumer opposition to prerecorded messages on the basis of a prior inquiry or transaction. 75 Fed. Reg. at 13475. But the airline messages at issue here do not derive from either a mere inquiry or a past transaction. They stem from an actual ticket purchase as part of a transaction that is not complete; the "business relationship" between airlines and these consumers continues at least until the flight takes place. And contrary to the FTC's experience, consumers of airline services have not registered their opposition to these automated notices in the Commission's docket.

Nor have they done so with DOT during the years when airlines have followed this practice. In point of fact, the Department considers these communications beneficial consumer services rather than unwanted and invasive attempts to garner additional business, and it is for that reason we have proposed to require large airlines to continue them to the extent that they already provide them.

It is of course possible that DOT will conclude its rulemaking by not ordering the continuation of existing airline flight change notification practices. But even in that event, our past experience and the absence of any contrary record before the FCC strongly suggest that airlines and their customers would prefer this practice to continue. A regulation that would

require the prior written consent of ticketed passengers before airlines could send these automated messages could only hinder communication of this helpful information that the Commission now properly considers "deemed to be invited or permitted." 75 Fed. Reg. at 13475.

For the foregoing reasons, the Department requests that the FCC not change its current exemption, but continue to allow air carriers to inform passengers of changes in the status of their flights without prior written consent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert S. Rivkin", with a stylized, wavy line extending from the end.

ROBERT S. RIVKIN  
General Counsel

August 5, 2010